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[Vol. 1]

Professor R.E. Scane

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PART II: Property Rights in Land

Section 1 - Introduction

THE DOCTRINE OF TENURE

The common law with respect to interests in land derives directly from the Norman Conquest. After the Conquest in 1066, William was faced with the task of consolidating his position and administering his new realm. He needed, and would continue to need soldiers, and the means to supply and maintain them. He needed a social and administrative system which would facilitate control of his realm. He needed a means of rewarding both those who had followed him in his campaigns, and those leaders among the conquered who would voluntarily accept his sovereignty.

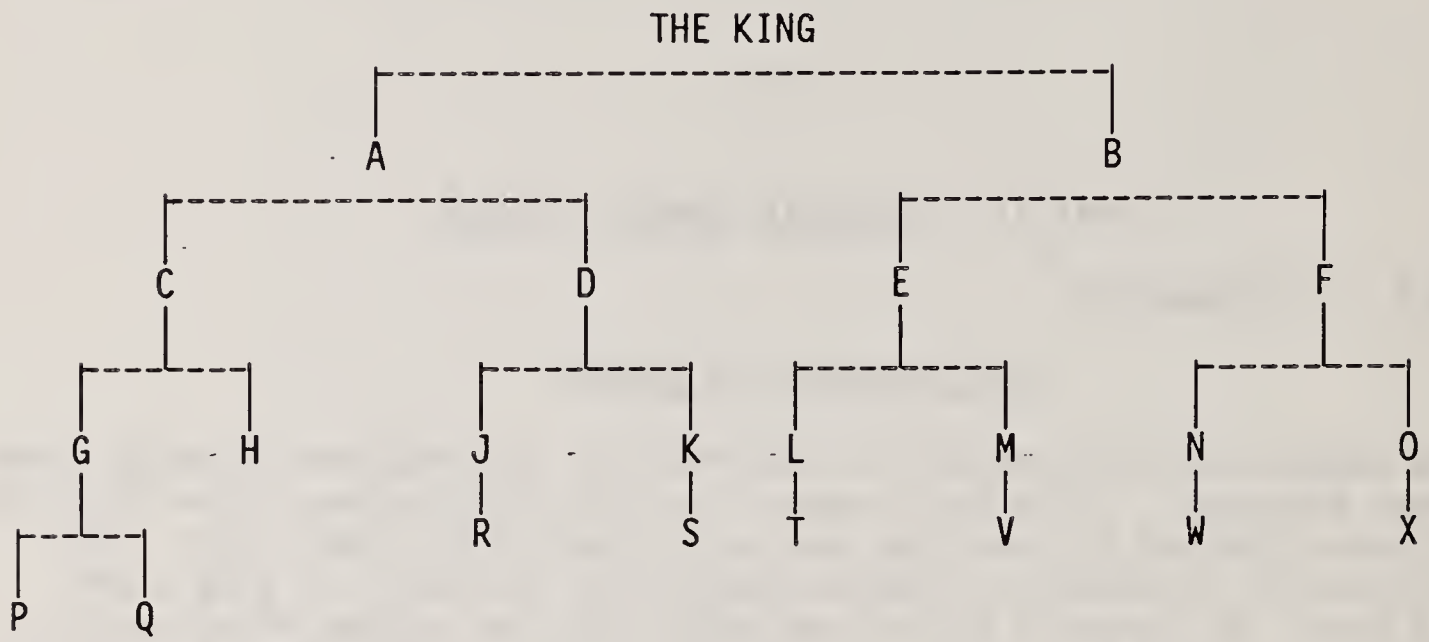
In the 11th century, the primary, almost the only, source of wealth was land, and the means of controlling land thus became the major means of distributing wealth and facilitating administrative control. William did not invent the so-called feudal system, which had evolved in Europe, but he refined it and imposed it on England in a complete and effective manner. The system, broadly speaking, exchanged rights in land for the supply of services needed by the landlord.

The first principle of land law established by the Conquest is that the sovereign acquired the absolute title to all land in the realm. This is the basic premise of the land law in Ontario and other common law provinces today.

The King, as paramount landlord, then parcelled out the available land to his chief associates, who **held** their interest in that land from the King, in return for some agreed flow of services up to the King. Those **holding** the interest in land from another became the **tenants**. Those tenants who held their interests directly from the King, and rendered their services directly to the King, were the **Tenants-in-Chief** (tenants *in capite*). There were about 1500 of these at the beginning of the 12th century.

The tenants-in-chief had their own followers, on a lower level, to be provided for. So, a tenant-in-chief might replicate the process by which he himself held his interest from the King, and in turn give an interest in some of the land he had received from the King, to another. That person would agree to supply services to the tenant-in-chief in return. The process might continue downward, until eventually, some geographical portion of the land was held by a person who actually used it by putting it into production as cropland, or pasture, or as a building site, rather than regranting it to someone else in return for services. This holding of land in return for services was **tenure**.

The structure of landholding was thus of a pyramid nature:



A & B are tenants in chief
C - O are "mesne" (middle or intermediate) tenants.
P - X are the tenants who actually occupy the land ("tenants paravail")

The services due to the King from A and B become charged on the land, and are recoverable "from the land", that is, from any person into whose hands the land comes. Similarly, the services due to A from C become charged on the land. G, then, may be made responsible, should C and A, or either, default on their respective obligations, not only for the services owed by himself to C, in return for the interest received from C, but also, for those due from C to A, and from A to the King. Ordinarily, the immediate grantor would agree to indemnify his own tenant against these existing obligations which encumbered the land at the time he carved out the new interest for his own tenant.

The "carving out" of an interest by a tenant-in-chief or a mesne tenant, and the conveyance of that interest to a tenant lower in the pyramid (e.g. the creation by A of an interest in favour of C, to be held of A) became known as **subinfeudation**. [This word comes from the words "**feud**" or "**fief**" which you will soon become familiar with in its form, "**fee**". The word originally signified a conditional award of land, the recipient receiving the land on condition that stipulated services be rendered faithfully.]

Gradually, tenures of land came to be classified by the nature of the services owed. The principal tenures were:

(a) **Knight-Service**: This was the military tenure, the service originally being to supply persons, and equipment, to serve in the military forces. At a fairly early stage, the actual service was usually commuted for a money payment [**scutage**, or "shield money"].

(b) **Frankalmoign**: A religious tenure. The tenant was obliged to supply religious or spiritual services, (e.g. to pray for the souls of the grantor and his family). Eventually, only holders of religious office or religious institutions could hold under this tenure.

(c) **Sergeantry:** Services of a personal nature, performed for the landlord.

(d) **Socage:** Basically, this form of tenure involved agricultural services. It was the residual category of tenure, encompassing any form of tenure not coming under another category. Originally, it usually would have involved some stipulated service with respect to the landlord's own agricultural operations, but, like knight-service, at a relatively early stage, the services had usually been commuted into a money payment, or "quit rent". Payment of the rent quit the tenant of the obligation to render other service.
[One explanation for the word "socage" is that it derives from the old French word "soc", or plough.]

All of the above tenures were **"free" tenures**, that is, the services exacted were certain. The tenant knew in advance the nature and extent of the obligations owed in return for the landholding. (e.g. To supply one mounted knight for x days per annum, or to plough the lord's fields for y days.) Originally, only tenants holding by "free" tenures were entitled to protection in royal courts. The tenure of the villein, serf, or unfree person, was marked by the uncertainty of his obligations (e.g. to work x days on the landlord's lands, at work of the landlord's choosing). Originally, the holder of land for unfree services could obtain legal protection for his holding only in the manor court of his landlord. The holder's title was recorded on the rolls of that court, and it became common for the holder to receive a copy of the record. This "unfree" tenure became known as "**copyhold**".

Although the doctrine of tenure has little practical importance, as such, in modern land law, it has played its part in shaping the form of modern law, as landholders sought to maximize the advantages of the system, and avoid the disadvantages. One of the major disadvantages was that the

system functioned as a structure for taxation, in that Royal revenues largely derived from feudal payments. Over time, the actual services to be rendered in return for the land-holding became less and less important, as they became commuted for fixed amounts which gradually became economically unimportant with the declining value of money. But the feudal system also encompassed extraordinary levies, or **incidents**, which were of significant importance. The major economic incidents were:

(a) **Relief:** Because of the personal nature of the system in its early stages, it was important to a landlord to be able to choose and control the tenant who held of him. Originally, with the military tenures, the grant ended when the grantee died. However, if the grantee's child or other relative could convince the landlord that they would be an acceptable substitute, they might get a regrant. The payment of a "relief" was probably designed to help convince the landlord. Later, the right to succeed to the ancestor's land on death became established, and the payment became a customary incident. It could thus be roughly equated to a death tax, or succession duty, payable to the superior landlord, and was usually

substantial, often a year's income of the land. Tenants-in-chief were even worse off, for the King was entitled to primer seisin ["first seisin". Seisin means "possession of a freehold estate in land". The meaning of "freehold estate" will be explained later in the course]. Primer seisin entitled the King to a further year's profits.

(b) **The "aids".** These were special charges due to the landlord on occasions of heavy expense to him. To keep landlords from inventing new occasions for such levies, Magna Carta limited these occasions to three: the knighting of the eldest son, the marriage of the eldest daughter, and the ransoming of the lord if captured in warfare.

(c) **Wardship and marriage.** Where the tenant of a military tenure died and left an heir who, if male, was under 21, or if female, under 14, if married, or under 16, if unmarried, the heir found his or her lands under the wardship of the landlord, who was entitled to take the profits of the lands for himself, without liability to account for them during the wardship. In addition, the landlord had the right to select a spouse for his wards. Obviously, a marriage to a ward with valuable lands was something worth money to arrange, and thus this right was of great value to landlords with infant tenants. The infant did not have to accept the marriage arranged by the landlord, but if the applicant for the ward's hand was otherwise suitable, the landlord was entitled to compensation from the ward for loss of his bargain. Landlords were similarly entitled if the ward married without the landlord's consent.

(d) **Escheat and forfeiture.** If a tenant died without heirs to succeed to the land, his estate, or interest, come to an end, and the interest "carved out" of the landlord's own interest thus became extinct. In effect, the interest which **escheated** went back to the landlord.

Escheat to the landlord, subject to certain temporary Crown rights against the land, could also take place if the tenant were convicted and sentenced to death for felony. However, if the felony was high treason, the convicted tenant's interest was **forfeited** to the Crown.

The system outlined above did not remain immutable. Gradually, services became commuted into money payments, customary in amount, and, with inflation of the economy, less and less important. Finally, under the Commonwealth of Cromwell, major reforms were effected, and these were confirmed after the Restoration by the Tenures Abolition Act of 1660, which converted all free tenures except frankalmoign into "free and common socage", and abolished wardship and marriage, the "aids", and many other burdensome incidents.

In Canada, by the Constitution Act of 1791 (the United Kingdom statute which separated Quebec into Upper Canada and Lower Canada), all lands are to be held "in free and common socage". There is now no practical significance to this designation beyond the single remnant of the doctrine of tenure, the concept of **escheat** on failure of heirs. At common law, when the owner of an **estate in fee simple** [for now, simply accept that this is the greatest interest that a person can own in land, and is what we usually mean by "owner"] died without a will disposing of the land, and without discoverable next-of-kin to take the land on intestacy, the land escheats to the Crown in the right of the Province. See Attorney-General of Ontario v. Mercer (1883), 8 App. Cas. 767. This right, in Ontario, is now codified into statute: Succession Law Reform Act, R.S.O. 1980, c. 488, s. 47(7).

> [In effect, the same thing happens to personal property, but not under the doctrine of escheat, which pertains only to realty. With personal property, the Crown takes under the doctrine of "**bona vacantia**" (vacant, or unpossessed, goods). The statute, above, covers both.]

After land has escheated, in Ontario, the provisions of the Escheats Act, R.S.O. 1980, c. 142, came into play. This Act gives the Government the right to grant escheated land to any person having a moral or legal claim against the deceased former owner. A long-time, unmarried cohabitant of a deceased owner is a person who might benefit from these provisions.

Also, there are special provisions dealing with land owned by a corporation which ceases to exist, and which owned land immediately before its dissolution. There was authority at common law that, in such case, the land did not go to the Crown, but to the person who granted the land to the corporation. Now, in Ontario, by statute, undisposed of real or personal property at the date of the dissolution goes to the Crown.

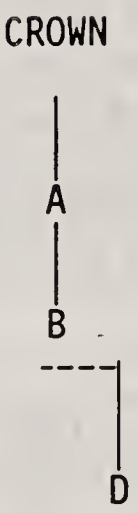
> See: Corporations Act, R.S.O. 1980, c. 95, s. 322
> Business Corporations Act, R.S.O. 1980, c. 245, s. 54.

The Right of Alienation

The right of a holder of a tenure to alienate the interest to another during the holder's lifetime ("inter vivos") evolved gradually, and, by the time of Henry II (1154-1189), appears to have been well established, subject to making a customary payment to the landlord. However, there were, from the perspective of landlords, serious problems with the manner of alienation. Suppose there is a feudal chain as follows:

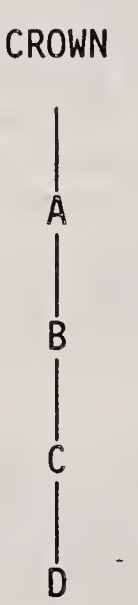
C wishes to alienate to D. C can do so in two ways.

(a) C can <u>substitute</u> D for C in the chain, so that the chain now appears:



This was "**alienation by substitution**". C simply conveyed his or her existing interest, with its rights and burdens, to D, and D stood in C's shoes.

(b) C can lengthen the chain, by carving out of C's own interest an interest for D, to be held of C, as D's landlord.



This was "**alienation by subinfeudation**".

This lengthening of the chain was economically disadvantageous to superior landlords in the chain. For example, if B obtained wardship over the heir of C's interest, all he could get was the value of the services owed by D, not the actual economic value of the land itself. Dissatisfaction culminated in the statute, <u>Quia Emptores</u>, of 1290. This statute became part of Ontario law by the Property and Civil Rights Act of 1792 (now see R.S.O. 1980, c. 395) which brings into Ontario, among other law, the law of real property as it was in England on **October 15, 1792**. The **Statute of Quia Emptores** was also specifically reenacted in Ontario, and, although not consolidated, is still in force and may be found in R.S.O. 1980, Appendix A (vol. 9, page 9).

Quia Emptores effects were:

(i) the right of alienation by substitution of all or part of the lands held in fee simple, without consent of the landlord, was established.

(ii) Alienation by subinfeudation of estates in fee simple was prohibited.

This now obscure statute prevents us from resurrecting a feudal chain, were we so inclined. It operates quietly, every time the fee simple in a parcel of land is conveyed, ensuring that the grantee replaces the grantor in relation to the Crown, and does not become a tenant of the fee holding from the grantor.

In practice, it came to shorten the feudal chain, as mesne lordships were from time to time extinguished by escheat, and as records of mesne lordships disappeared. Simpson, in his History of Land Law, asserts that by Tudor times, mesne lordships were relatively uncommon, and that "the profits of feudalism become to an increasing degree Crown profits."

In common law Canada, there will be no "chain" beyond the holding by the present owner of the fee simple from the Crown, in [nominally] socage tenure.

From: R.S.O. 1980, Vol. 9

R.S.O. 1897, CHAPTER 330

An Act respecting Real Property

(Quia Emptores, etc.)

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

* * * * * * * * * *

Freeholders may sell their lands so that the feoffee do hold of the chief lord.

2. Forasmuch as purchasers of lands and tenements of the fees of great men and other lords, have many times heretofore entered into their fees, to the prejudice of the lords to whom the freeholders of such great men have sold their lands and tenements to be holden in fee of their feoffers, and not of the chief lords of the fees, whereby the same chief lords have many times lost their escheats, marriages, and wardships of lands and tenements belonging to their fees; which thing seemed very hard and extreme unto those lords and

THE ESTATE IN FEE TAIL

It has not been possible to create this estate in Ontario since 1956. In that year, the Conveyancing and Law of Property Act was amended to provide that a limitation [grant] in a deed or will which, prior to May 27, 1956, would have created an estate in fee tail shall now be construed as creating an estate in fee simple, or, if the grantor or testator did not own an estate in fee simple, then the greatest estate which the grantor or testator did own in the land. [See R.S.O. 1980, c. 90, s. 4.]

The estate never played a significant role in Ontario landholdings. It was more attuned to the social structure of another society, the great landholding class of England. When, in novels, one reads of land being "entailed", it is the fee tail to which reference is being made.

The "tail" comes from "tailler" - to cut down. It is a "cut down" fee simple. At common law, unlike the fee simple, it could descend by inheritance only to a person in the direct line of issue from the original grantee in fee tail. It evolved through the desire of persons to ensure that the family estates remained concentrated, and in the direct family. The creation of the fee tail, and its subsequent history, is a story of the struggle between the desire of powerful persons in society to "empire build" for their families' power and status, and the traditional leaning of the common law towards increasing, rather than restricting, the alienability of land.

The form of limitation to create a fee tail was to add to the traditional words of limitation to create a fee simple, so-called "words of procreation", viz: "To Joan and the heirs of her body".

In theory, as with the fee simple, the estate in fee tail could last forever. However, because of the restriction to inheritance only by direct issue of the original grantee, it was more likely to end for want of eligible heirs to take. Thus, it was possible to have a remainder or reversion after a fee tail.

The estate in fee tail is the creature of a famous statute in English legal history, the statute De Donis Conditionalibus, of 1285. Prior to that statute, a gift "to Joan and the heirs of her body" would have been construed as a conditional fee simple, the condition being that Joan have issue born of her. Once such issue were born, the condition was fulfilled (said the Courts), and Joan could then deal with her lands as a fee simple absolute. If Joan never had issue, it was considered that Joan had only a life estate, and the land reverted to the grantor after her death. If Joan did have issue, but did not grant away the land in her lifetime, it would then descend only to her direct lineal heirs, not to collateral heirs (i.e. lineal descendants of her ancestors, but not of herself), as a fee simple could. This construction by the courts, which freed the estate in Joan's hands from the restraint intended, should Joan wish to put it on the market, aroused the ire of the powerful landed classes, leading to the Statute of 1285. The effect of this statute was to prevent Joan from alienating the estate so as to destroy the rights of either reversioner or remainderman, on the one hand, or issue, on the other hand.

Thus, if Joan conveyed all of her interest to Timothy, then, if Joan died without lineal issue capable of inheriting, the reversioner or remainderman could recover the land from Timothy. If Joan died leaving a lineal heir, that heir could recover the land from Timothy. This would scarcely be an attractive proposition for Timothy, and that, of course, was the whole idea.

Various types of fee tail came to be known. Primarily, there was:

Fee Tail General: - "To John and the heirs of his body" - any direct lineal descendant of John was eligible to inherit.

Fee Tail Male, or **Fee Tail Female**: - "To Joan and the heirs female of her body" - here, only female descendants who could trace their descent from Joan through an unbroken female line could inherit. For example, a daughter of Joan's son would be ineligible.

Fee Tail Special: - only heirs of the body descended from a particular spouse of the grantee could take: "To John and the heirs of his body by his wife Joan."

These could be combined. One could have, for example, a "fee tail female special".

The history of the fee tail, after the Statute of 1285, is, at least to those of any historical bent, or even to those who are not interested in history, but like to watch a good fight, a fascinating story of the employment of legal fictions, and even brazen perjury condoned by the courts, as they fought back to restore the freedom of alienability of land, largely for economic reasons, that the Statute had purported to remove. Those interested are referred to the leading property texts, or, for those with a greater interest, the standard works on English legal history. For present purposes, it suffices to say that, over time, the courts evolved techniques whereby the tenant in tail could again alienate away his estate, by an inter vivos disposition, so as to create in the grantee an estate in fee simple, free of the claims of reversioners, remaindermen, and heirs. In effect, the transaction could create in the grantee a greater estate than the grantor possessed. This technique became known as "**barring the entail**". After 1833 in England (and 1844 in Upper Canada), the legislatures passed legislation permitting the entail to be barred by a simple deed, if the tenant in tail barring the entail had the estate in possession.

Although the modern lawyer will seldom be required to research the law on the estate tail, the necessity can arise. [For examination purposes you need not concern yourself with what follows.]

For example, suppose, in a will, you find a gift of Blackacre "to my sister Joan Smith, and her issue". This gift is fraught with ambiguity. Suppose, at the time the testator dies, Joan has two living children, A and B, and three living grandchildren, C, D, and E. A, B, C, D and E are all "issue" of Joan. [In a will, the prima facie meaning of issue is "direct descendants of any degree, "i.e., children, grandchildren, great-grandchildren and on ad infinitum.]

Did the testator mean, "To Joan, A, B, C, D, and E", to hold concurrently? If the answer to this is "Yes", then in what shares? Is Joan to have an equal share with each of A, B, C, D, and E? But perhaps the testator meant something different. There are many cases which have construed the words "and her issue", in a similar context, as being equivalent to "and the heirs of her body", thus making them "words of limitation". [The courts have always construed wills more liberally than inter vivos dispositions.] So construed, this, prior to 1956, would have given Joan a fee tail. By s. 4 of the Conveyancing and Law of Property Act, this construction would now give Joan the fee simple. A, B, C, D and E would get nothing.

An even more arcane situation could arise if the gift in the will were a gift of Blackacre "to John and his children". Ordinarily, "children" means "direct descendants of the first degree", i.e. the first generation descended from a person. But sometimes, the context can suggest that "children" is used in a wider sense, as equivalent to "issue", or lineal descendants of any degree or generation. There is authority to the effect that, absent context to the contrary, a gift of this nature will be construed according to the circumstances at the time the will was executed. If, at that time, John had living children, the words "and his children" would be construed as words of purchase, and John would share Blackacre concurrently with any of his children living at the testator's death, when the gift would become effective. If John did not have children living when the will was made, the words "and his children" would be construed as words of limitation, equivalent to "and his issue", and, in turn, equivalent to "and the heirs of his body". (See Wild's Case (1599), 6 Co.Rep. 16b.) This would, prior to 1956, give John a fee tail, and, in a will coming into effect after 1956, such a construction would give John a fee simple absolute. Whether or not a modern Canadian court would apply that construction, it is, at present, honestly arguable by counsel.

LIFE ESTATES

Estates whose duration is measured by the lifetime of a person, or of persons - a definite period of uncertain duration - are estates of freehold, but are not freeholds of inheritance, as are the estates in fee simple and fee tail. That is, at common law, the interest of the tenant of a life estate is not capable of descending to the tenant's heir.

Life estates may be divided into two classes, the conventional life estates, which arose as a result of the intention, or presumed intention, of the grantor of the estate to create an estate of this nature, and those life estates which arise by implication of law, independently of any intention of the parties. The last category no longer exists in Ontario today, as a result of changes in family law brought about by recent legislation. The conventional life estates still survive.

Conventional life estates may be further classified by the identity of the measuring life. In the ordinary life estate, usually called just a "life estate", the measuring life is that of the tenant of the estate.

e.g. "To A for life", which would be understood as meaning, "To A during the period of A's own life".

However, the measuring life might be a person other than the tenant, e.g. "To Joan, for the life of Susan". This form of estate is known as an "Estate pur autre vie". In addition to being created by an express grant, as in the gift to Joan above, it would be created by a conveyance, by the tenant of an ordinary life estate, of that estate.

Thus, if land is granted, "To Thomas for life", and Thomas conveys his interest in that land to Joan, all Joan can receive is an estate limited by the lifetime of Thomas. In effect, Joan now holds an estate in the form "to Joan, for the life of Thomas."

As mentioned, life estates, whether ordinary life estates or estates pur autre vie, are not estates of inheritance, and did not descend to the life tenant's heir on death. This is obvious in the case of the ordinary life estate, measured by the tenant's own life, but there could be a problem with the estate pur autre vie:

"To Joan for the life of Susan."

If Susan predeceases Joan, there is no problem of succession to the estate. Susan never had any interest in the land, and Joan's interest has now ended.

However, if Joan predeceases Susan, there is still unexpired time to be disposed of. Since Joan's interest was not an estate of inheritance, it could not descend to her heir on Joan's death. To get around this problem, the law developed special **rules of occupancy**, which depended on the exact form of the limitation.

> If the land was originally granted "to Joan for the life of Susan," then, on Joan's death before that of Susan, the first person to enter upon the land after Joan's death, and take possession of it, was entitled to enjoy the balance of the estate (i.e. until Susan's death) as "**General Occupant**".
>
> If the land was originally granted "to Joan and her heirs for the life of Susan", then the person who was Joan's heir was entitled to occupy the land until Susan's death, as a "**Special Occupant**".

In Ontario, today, an estate pur autre vie may be disposed of by will, whether or not there is a special occupant (Succession Law Reform Act, R.S.O. 1980, c. 488, s. 2(a)) and will descend to next-of-kin on the death of the life tenant intestate (Estates Administration Act, R.S.O. 1980, c. 143, s. 2).

COMPETITION BETWEEN INTERESTS

Because life tenants have possession of the land for only a limited period of time, there is potential for conflict of interest between the life tenant and the person who holds the remainder or reversion which will fall into possession when the life estate ends. In general, the life tenant's interest is to maximize return to himself or herself during the tenancy. [Basically, the life tenant is entitled to exclusive possession of the land, and to the income provided by the land, during the life tenancy.] The interest of the owner of the following estate is to preserve the value of the property for himself or herself to enjoy when it falls into possession at the end of the life tenancy. The two interests are seldom compatible.

In fact, most life interests today are interests under trusts, where a trustee will have certain responsibilities for balancing the competing interests, under the terms of the trust instrument or the general law of trusts. It is rare, nowadays, to find a life interest which does not involve a trust. The techniques that the general law, apart from the law of trusts, has worked out to attempt to strike a balance between the competing interests are comparatively crude. However, they exist, and, to the extent that they go, they usually guide the situation under trust law as well.

"Emblements": These rights, applicable to agricultural land, adjust rights between life tenant and holder of the remainder or reversion, where the life tenant dies before the crop is in. Who gets it? The life tenant's estate is entitled to "**emblements**", that is, the right to enter upon the land, reap and remove any annual crops which the life tenant had sown. However, the estate of the deceased life tenant was not entitled to perennial crops, such as the apples out of the orchard.

"**Waste**": This doctrine restricts the ability of the tenant to use the land as he or she pleases during the life tenancy. The doctrine of waste is designed to protect against injury to the capital value of the land. [You should realize that "land" includes "**fixtures**", that is, any building which is in any degree attached to the land.]

Technically, waste is any act which alters the physical nature of the land, either for better or for worse. However, for purposes of considering legal liability for waste, acts were divided into four classes:

(1) **Ameliorating Waste**: Alterations which improve the capital value of the land. The life tenant may build a bigger and better barn. As no damage is suffered by the successor interests, damages will not be awarded. In rare circumstances, if the whole character of the property would be changed by the alterations, an injunction may be granted.

(2) **Permissive Waste**: This is "non-feasance", in tort terms - the failure to do that which ought to be done. The life tenant may do nothing about maintenance of buildings during the tenancy, for example. Although the issue is not as clear in the cases as one might wish, the common law appears to be that life tenants are NOT liable for permissive waste unless the grant to the life tenant imposed an obligation to repair:

[Reference: Re Cartwright (1889), 41 Ch.D. 532; Patterson v. Central Loan & Savings Co. (1898), 29 O.R. 134; Morris v. Cairncross (1907), 14 O.L.R. 544; Re Robertson, [1951] O.R. 309.]

[**Note**: Students are not expected to review these cases for the purposes of this course.]

(3) **Voluntary Waste**: This is misfeasance, the doing of that which ought not to be done. Deliberate or negligent damage to buildings, cutting down timber for sale, or otherwise physically injuring the premises, come under this head. A tenant for life is liable for voluntary waste unless, by the terms of the grant creating the tenancy, the grantor has exonerated the life tenant from such liability. A life tenant so exonerated is said to be made "**unimpeachable for waste**".

When dealing with minerals, the law distinguishes between situations where (i) the mine, gravel pit, etc., is already open when the tenancy is created, and (ii) where the life tenant is the first to commence extraction of the minerals. In (i), the life tenant is allowed to continue to work the minerals, whether or not he or she is unimpeachable for waste. The law assumes that a grantor who grants property containing an opened mine must have considered the extraction of the minerals to be part of the annual profits of the land, to which the life tenant is entitled. However, in case (ii), the life tenant will be liable for waste, unless made unimpeachable for waste, for newly opening a mine. The life tenant will be liable to the owners of the succeeding interest for damages, and may be enjoined from continuing the activity.

(4) **Equitable Waste**: This is a form of voluntary waste which a court of equity would enjoin, even where the life tenant was unimpeachable for waste. It is a class of waste so heinous that the court can conclude that the grantor of the life interest could not have had such conduct in mind when making the life tenant "unimpeachable for waste". To protect a life tenant against equitable waste, the grant must specifically make the life tenant unimpeachable for equitable waste.

A classic case of "equitable waste" is found in Vane v. Lord Barnard (1716), 2 Vern. 738, the "Raby Castle" case. Here, Raby Castle was settled on Lord Barnard for life, without impeachment for waste. His son was entitled in remainder to a life estate in the castle, after the death of Lord Barnard. As a result of a family dispute, Lord Barnard got so annoyed at his son that he collected 200 workmen and started to dismantle the castle. At the suit of the son, the Court issued an injunction against further waste, and ordered Lord Barnard to repair the damage already done.

"Outgoings"

The possession of land usually involves expenditure for upkeep, not only for repairs or improvements, but also for taxes, mortgage repayments, and insurance premiums. These must be allocated fairly between the life tenant and the owners of the future interest. Generally, expenses on current account are the responsibility of the life tenant in possession, those usually thought of as being on capital account are the responsibility of the reversioner or remainderman. For example taxes and mortgage interest, are the responsibility of the life tenant. Mortgage principal repayments are the responsibility of the owner of the future interest. The adjustments can become quite complex, and this issue will not be further pursued here.

Settled Estates Act, R.S.O. 1980, c. 464.

The splitting of ownership between the possessory interest of the life tenant and the future interest of the reversioner or remainderman can make it difficult to exploit the value of the land. The land may be underutilized economically, but, unless the life tenant and future interest

owner can get together and agree to join in a course of action, the land could not be developed as long as the life tenancy existed. Who would give a mortgage on the security of a life estate, where the estate might end just after the loan was handed over? Who would buy it to develop it? In fact, why would a life tenant put up sizeable amounts of his or her own funds to develop the land, if there is a risk that the successor owner will reap the benefit?

As mentioned, if the life tenant and reversioner or remainderman can join together, they can deal with all of the interest in the land, and effectively convey or mortgage it. But this may not be possible. In addition to the possibility of disagreement about the wisdom of the proposed action, there may be no capable reversioner or remainderman to cooperate with the life tenant. The remainderman might be an infant, without capacity to bargain, or indeed, may be a person or persons whose identity is not yet ascertainable. They may not even have come into existence (e.g. "To my sister Joan for life, and then to her children living at her death, in fee simple, in equal shares." Joan is a young woman, whose has as yet had no children. Even if she has children, she may have more, and we don't know that her present children will remain living at Joan's death. The existing children, if any, and the potential children have contingent interests in the remainder. If Joan wants to raise a mortgage on the property today, you can see the problem we will have in dealing with the remainder interest.

Under modern trusts, and trust wills, the property will usually be given to a trustee or trustees, or trust for Joan for life, and then on trust for the children, etc. A well drawn trust will give the trustees power to deal with the property to enable its development, if the trustees consider this desirable. But if the necessary power is not given, or if there is no trust, it is possible that the Settled Estates Act may assist.

Students are not responsible for the details of this Act, for the purposes of this course. It permits a court to authorize dealings with "settled" estates (in the simplest form, estates granted to a life tenant, with remainder or reversionary interests following) under certain conditions. A transaction authorized under the Act binds the life tenant and any remainderman or reversioner, whether or not they have entered into the transaction. In a more limited class of situations certain persons, including life tenants, may enter into transactions which will bind remaindermen or reversioners, without the approval of the court. These cases involve leases for a term not exceeding 21 years, provided the lease meets the specifications of the Act.

Thus, if, in our example, Joan wishes to rent out the property of which she is life tenant, she can rent it to Timothy for up to 21 years. If the Act is complied with, Timothy is secure for the agreed term of his lease, even if Joan dies shortly after the lease is granted. The persons entitled to the land after Joan's death are bound by the lease.

Where the nature of the transaction makes it appropriate to do so, the receipts from a transaction can be apportioned by the court between the life tenant and the eventual owners of the future interest in the lands.

Life Estates Arising by Operation of Law

[Note: Students are not responsible for the contents of this section for examination purposes.]

In Ontario, these estates are now abolished, but the abolition is sufficiently recent that you should have some idea of what they were. Both of these estates arose out of the relationship of husband and wife.

(1) **The estate which gave a husband a right in the lands of his deceased wife.**

An "Estate by the Curtesy", (or originally, and more fully, an "estate by the curtesy of England")

At common law, upon marriage, a husband and wife were treated, for many purposes in law, as a single legal entity. A married woman was known in law as a femme couvert, a single woman as a femme sole. When a married woman became seised of freehold lands, her husband automatically acquired an interest therein, entitling him to control the lands during his lifetime, and to take the rents and profits. The wife could not dispose of her estate, during her husband's lifetime, without his concurrence. The husband could dispose of his own interest therein, effectively giving to another an estate pur autre vie, measured by the husband's life, but that was the extent of his dispositive rights.

If the husband survived the wife, and met the conditions imposed by law, he became entitled to a life estate in all of his deceased wife's freeholds of inheritance of which she died seised. To qualify, issue capable of inheriting the wife's freeholds must have been born alive. The issue did not have to survive the wife in order for the husband to take.

In the late 19th century, statutes emancipating the wife's property came into being in most common law jurisdictions. In England, and in Ontario, the legislation was The Married Women's Property Act. (This was passed in Ontario in 1884, and eventually repealed in 1975, when it was replaced by new family property legislation. By this Act, all married women were empowered to hold and dispose of their property as if they were a femme sole. In other words, a married woman could thereafter control her own property and retain its profits, sell it during her lifetime, or give it by will on her death, all without the concurrence of her husband. To the extent that she exercised the rights of disposition, the husband's rights to curtesy were extinguished. For example, if the wife died seised of the fee simple in Blackacre, and by her will, left Blackacre to her son S, the rights of S prevailed. The husband was not entitled to an estate by the curtesy in Blackacre.

Thus, the estate could now exist only if the wife died intestate as to Blackacre (i.e. without having disposed of Blackacre by her will). If that happened, and if the requirements for curtesy were met, the husband could obtain his estate by the curtesy in her lands, i.e, a life estate in all of her lands, if he so elected. In fact, it was very rare that such an election would be made, for, in making the election, the husband had to give up the rights in her estate to which he would be entitled as a surviving husband under the provisions of the statutes governing distribution of property of persons dying intestate. Usually the husband was far better off with those rights. In addition, particularly in Ontario, there was some uncertainty as to the rights of a husband who elected curtesy to the

personal property of his deceased wife. (Most probably, he was entitled to all of it absolutely, but there was some question on this score.) If the husband did not make an election as required by the statute, within six months of the wife's death, he was deemed to have elected against taking curtesy, and in favour of taking his statutory share in her estate.

The right of a husband to choose to take an estate by the curtesy was abolished for deaths occurring on and after March 31, 1978. See Succession Law Reform Act, R.S.O., c. 488, s. 48.

(2) **The estate which gave a wife a right in the lands of her deceased husband.**

"Dower"

"Dower", at common law, was a wife's right on surviving her husband, to take a **life estate** in **one-third** of the freeholds of inheritance of which her deceased husband was solely seised at any time during the marriage, to which her issue by him could possibly have inherited. The husband had to be solely seised of the lands. The wife was not entitled to dower out of lands of which the husband was a joint tenant with another, although she was entitled if he were a tenant in common with another. (The meaning of these terms will become clear later in the course.)

Dower was a far more powerful right than curtesy, for, unlike curtesy, a husband could not easily evade his wife's potential right to dower. (A technique was available, but it had to be used when the husband acquired his lands.) Once the husband became solely seised of the legal estate in a freehold of inheritance, his wife's right to obtain dower in those lands if she survived him attached to the lands. That right would remain attached even if the husband conveyed the lands to another person. At this stage, the wife was said to have an **inchoate right** to dower. Obviously, a person would be unwilling to take a conveyance from a husband if, should the husband die, leaving his widow surviving, the widow would be entitled to obtain a life interest in one-third of those lands. So, a buyer or mortgagee would not deal with a husband whose wife had an inchoate dower right unless the wife voluntarily joined in the transaction to release her dower interest. When the wife did so, she was said to "**bar her dower**". The husband could not defeat the right to dower by giving the lands away by his will, either. The person to whom the lands were given by will would take them subject to the widow's dower right. All a husband who wished to devise lands, out of which his widow was dowable, to a person other than his widow could do was expressly put her to her election by the provisions of his will. That is, he could give her other property, and make the gift of that other property conditional upon her giving up her dower right. That is why, in many old wills, you will see a statement to the effect that the provisions made for a widow are "in lieu of dower", such statement being intended to put the wife to her election. If the will did not put the wife to an election, the widow was entitled to both the dower and the gift to her in the will.

The whole subject of dower was complex, and required careful attention in title searches, lest there be an unbarred potential dower interest lurking. It also occasionally caused problems where husbands died intestate, because a wife had to elect between her dower right in his lands and her right to share as a widow in his lands under the statutes which governed succession to the property of intestates. As with curtesy, the wife was usually far better off selecting her distributive right. Unlike the situation with curtesy, however, the presumption was that, absent a formal election to take the distributive share, the widow elected to take her dower interest. This presumption often caused problems if the widow was not made aware of this.

Dower, in its origins, was designed to give economic security to widows. For many years prior to its abolition, it had ceased to serve that maintenance function, at least directly, in most cases. Other rights to which a widow could resort in case of need were usually more rewarding for her. The practical value of dower was more likely to become apparent in the case of a marriage breakup, where a wife, by refusing to co-operate by barring dower, could, in some cases, put considerable pressure on a husband who needed to deal with his land.

With the new regime for adjustment of property and support rights between spouses introduced in Ontario in 1978, dower was abolished. Dower was abolished by the Family Law Reform Act, 1978, S.O. 1978, c. 2, s. 70. The Family Law Reform Act was itself generally repealed by The Family Law Act, S.O. 1986, c. 4, but s. 70 of the Family Law Reform Act was expressly retained in force.

NOTE: The decision of the Ontario Court of Appeal was further appealed to the Supreme Court of Canada: [1979] 2 S.C.R. 104, 97 D.L.R. (3d) 631. The Supreme Court of Canada reversed the C.A. on the issue of the effect of the Ontario Water Resources Act, and held that the Act would ground a private right of action for damages suffered as a result of a defendant pumping more than 10,000 gallons per day without a permit. Pigeon J., in delivering the judgment of the Court, therefore did not find it necessary to consider whether the Court of Appeal was right in rejecting the so-called "English Rule".

The answer to the question posed given by the Ontario Court of Appeal (see above) was varied to read:

> "In an action by an owner of land in negligence or nuisance from the pumping of ground water not flowing in a defined channel for any damage resulting from the obstruction of such water, no right of another owner to pump such water avails as a defence in respect of any pumping exceeding the quantity authorized under the Ontario Water Resources Act."

Court: Martland, Ritchie, Spence, Pigeon, Dickson, Estey and Pratte JJ.

NOTE: In Stephens v. Anglian Water Authority, [1987] 1 W.L.R. 1381 (C.A.), the Court of Appeal considered itself bound by Bradford Corporation v. Pickles, [1895] A.C. 587 (H.L.) and Chasemore v. Richards (1859), 7 H.L. Cas. 349, to hold that a landowner could extract subterranean water not flowing in defined channels regardless of the consequences to neighbours, and regardless of intention in doing so. Such a landowner could not be under any duty of care to neighbours in so doing, and could not be guilty of negligence. The action, which alleged subsidence of the plaintiff's land, was pleaded only in negligence, not in nuisance, but the reasoning of the C.A. must extend to a nuisance claim as well.

Slade, L.J., giving the judgment of the Court, said, "As the law stands, the right of the landowner to abstract subterranean water flowing in undefined channels beneath his land ... appears to us, in the light of those authorities, to be exercisable regardless of the consequences, whether physical or pecuniary, to his neighbours. Whether or not this state of the law is satisfactory is not for us to say."

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CONCURRENT INTERESTS IN LAND

To this point, we have been discussing ownership of an interest in land as if there were only one owner at one time. However, it is possible that two or more people may simultaneously share the same estate in the same land. Indeed, this is a common occurrence, especially in family situations.

There are two types of co- ownership which are of practical importance to-day. These are, **joint tenancy**, and **tenancy in common**. (Those who desire to investigate other forms of concurrent interests which have existed could research **co-parcenary** and **tenancy by the entireties**.)

JOINT TENANCY

While joint tenants of land have separate rights as between themselves, as against anyone else, they are in the position of a single owner. A mathematician would symbolize A and B, as joint tenants of a parcel of land, as (A + B).

The practical importance of finding that two or more people hold a parcel of land as joint tenants is that joint tenancy carries with it the **right of survivorship**. If A and B hold Blackacre as joint tenants, then, on the death of A, her interest in Blackacre passes automatically to B. A cannot make a will which gives her interest in Blackacre to anyone on her death, nor can her interest pass to anyone on her death intestate. ("Intestate" means, "without a valid will".)

Similarly, if A, B, and C hold Blackacre as joint tenants, then, on the death of A, her share will pass automatically to B and C, who will continue to hold the land as joint tenants. If B is the next to die, his share will pass automatically to C. C will now be the sole owner of the land. The joint tenancy is over, because there is now only one owner.

As long as the land is held jointly,each joint tenant has an **undivided share** of the whole parcel, and the interest of each joint tenant is equal to that of each other joint tenant. By an "undivided" interest, we mean that the land is not physically divided up between them. No joint tenant can point to any part of the land and say, "That is all mine," and point to another part and say, "That is yours". No matter how infinitely small the physical portion, each of the joint tenants owns an equal share with each other joint tenant.

At common law, a corporation could not be a joint tenant. However, this became inconvenient, particularly with respect to trusts and the administration of estates of deceased persons, where joint tenancy can be useful. Therefore, the common law position was reversed, and corporations may now hold as joint tenants. Where a corporation is dissolved, or has its legal existence terminated in any way,its undivided share passes to the remaining joint tenants, just as if had been an individual who had died. See the **CONVEYANCING AND LAW OF PROPERTY ACT**, R.S.O. 1980, c.90, s.43.

THE "FOUR UNITIES"

A joint tenancy is characterized by the presence of these "unities". These must be present if a joint tenancy exists. (There are some exceptions to this very general statement with respect to the unity of "time", but, for your purposes in this course, you may ignore these and accept the general statement as dogma.)

Unity of Possession: This "unity" is common to all forms of concurrent ownership, not just to joint tenancy. As indicated above, each co-owner has an undivided ownership interest in each and every molecule of the land, and accordingly, each has an equal right to the possession of each and every portion of the land.

Unity of Interest: The interest of each joint tenant is identical in nature, extent and duration to that of every other joint tenant of the estate.

(1) Each joint tenant has an equal right to share in the rents and profits of the land.

(2) The interest of each joint tenant must be of the same nature as that of the others. e.g. All of the joint tenants must be freeholders, or all leaseholders. All of their interests must be of the same duration. That is, all must hold for life, or all in fee simple, or all for the same term of years. All must hold in possession, or all in remainder, or in reversion.

Unity of Title: All joint tenants must take their title to the land under the same instrument, whether it be a deed or a will.

Unity of Time: The interest of each joint tenant must vest at the same time. (Later in this course, we will deal with the meaning of "vest").

At common law, if land was granted to two or more people for the same estate, and the grant itself contained nothing to indicate the nature of their concurrent interests, it was considered that they took as joint tenants. This is still the rule with respect to personal property, which can be held jointly, with a right of survivorship, just as land can be, but the rule has been changed by statute in the case of land. The Conveyancing and Law of Property Act, s. 13, applies when land is granted to two or more persons, other than executors of a deceased person's estate, or trustees, in fee simple or for any lesser estate. They will take as tenants in common, not as joint tenants, unless the document makes it clear that a joint tenancy is intended. You should note that this section is applicable to interests created by an inter vivos disposition, or by a person's will. Similarly, if a person dies intestate, owning land, and, under the rules governing distribution of property on intestacy, the land descends to two or more persons,they will now take as tenants in common, and not as joint tenants. See the **Estates Administration Act**, R.S.O. 1980, c.143, s.14.

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TENANCY IN COMMON

As under a joint tenancy, there is unity of possession among the tenants in common. None can claim any particular physical portion of the land as his or her own, to the exclusion of the others. In other words, the property is not physically divided among them. But, unlike the joint tenancy, in all other respects, their interests are separate and distinct. Thus, it is possible that the shares of tenants in common may be unequal. A and B may hold Blackacre as tenants in common, with A holding a 1/3 interest, and B holding a 2/3 interest. This would not be possible under a joint tenancy, as the requirement of unity of interest would demand that the interests of A and B be equal.

In the above example, on the death of A, her 1/3 interest would descend to the executors or administrators of her estate, to be disposed of according to her will, or according to the intestacy rules, as the case might be. **There is no right of survivorship** in a tenancy in common. B will not take A's share, unless, of course, A leaves her share to B in her will, or unless B is the person who takes A's share under the intestacy rules. In such case, B would not be taking by right of survivorship, as would be the case under a joint tenancy, but as a beneficiary under the will, or under the intestacy rules.

Thus, of the "four unities",the only unity which must be present in a tenancy in common is unity of possession. For example, there need not be unity of interest. Suppose, in the above example, that A dies, leaving a will which gives her 1/3 interest in Blackacre to X for life, with remainder to Y in fee simple. During the lifetime of X, Blackacre will be held by B and X. B will hold his undivided 2/3 interest in fee simple; X will hold his 1/3 interest for life. Both of these are interests in possession. At the same time, Y will be holding a 1/3 interest in remainder.

From the above, you can see that there need not be unity of title. Suppose that A and B originally took their interests under a deed from O. After A's death, B continues to hold his interest by virtue of that deed. However, the interest of X originates under the will of A, a different instrument.

Similarly, in the above example, there is no unity of time. B received his interest [it "vested" in him] at the time O delivered his deed to A and B. However, X did not receive his interest until A's will came into effect, i.e., at A's death.

It is possible to combine a joint tenancy and a tenancy in common in the same land. Suppose Blackacre is originally held by A and B as tenants in common, in equal shares. B dies, and by her will, leaves her 1/2 interest in Blackacre to X and Y, as joint tenants.The property is now held by A[1/2 share] and (X and Y)[1/2 share]. X and Y, as joint tenants of their undivided 1/2 share of Blackacre, have a right of survivorship as **between themselves**. If X predeceases Y, X's share of the 1/2 interest will pass to Y, as the surviving joint tenant.Y will now hold that share as a tenant in common with A, and, if Y now dies, Y's share will <u>not</u> go by survivorship to A, but will go as directed under Y's will, or if no will, under the intestacy rules which apply on Y's death. If A had died while X and Y were both alive, A's share would have passed as directed under A's will, or under the rules of intestacy as applied to A's estate. A's share would not have passed by survivorship to X and Y, or either of them.